No. 86-1945

FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

VARIAN ASSOCIATES, INC.
Petitioner,

VS.

MILTON UTLEY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

GILMORE F. DIEKMANN, JR.
BRONSON, BRONSON & MCKINNON
555 California Street
San Francisco, CA 94104
Telephone No. (415) 986-4200
Attorneys for Petitioner
Varian Associates, Inc.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864 2300

TABLE OF CONTENTS

Page

I

Plaintiff's executive order claims were based solely upon petitioner's alleged violation of Executive Order 11246 and its implementing regulations, with state law simply providing an additional remedy 1

II

The Ninth Circuit's decision will impair significant federal interests in the integrity of the Executive Order's administrative remedial scheme 4

III

The jurisdictional rulings of the Ninth Circuit conflict with the Fifth Circuit's decision in Farkas 8

IV

Conclusion 10

TABLE OF AUTHORITIES

Cases

	Page
Bell v. Hood, 327 U.S. 678 (1946)	9
Farkas v. Texas Instruments, Inc., 375 F.2d 629 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967)	8
Franchise Tax Board v. Laborers' Vacation Trust, 463 U.S. 1 (1983)	2, 4, 8
Merrell Dow Pharmaceuticals, Inc. v. Thompson, ____ U.S. ____, 106 S.Ct. 3229 (1986)	4, 5, 6, 7, 8, 9
Moore v. Chesapeake & Ohio Railway, 291 U.S. 205 (1934)	6
Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921)	4, 8

Statutes

California Business and Professions Code § 17200	2
California Government Code § 12940	2
28 U.S.C. § 1331	7, 8
28 U.S.C. § 1441(a)	9

Miscellaneous

Executive Order 11246, 30 Fed.Reg. 12319 (1965), reprinted in 42 U.S.C. § 2000e appendix, at 28-31 (1982)	1, 2, 6, 8, 9, 10

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Varian Associates, Inc., submits the following reply brief in support of its petition for a writ of certiorari.

I

PLAINTIFF'S EXECUTIVE ORDER CLAIMS WERE BASED SOLELY UPON PETITIONER'S ALLEGED VIOLATION OF EXECUTIVE ORDER 11246 AND ITS IMPLEMENTING REGULATIONS, WITH STATE LAW SIMPLY PROVIDING AN ADDITIONAL REMEDY

In his opposition to Varian's petition for certiorari, Respondent seeks to leave the impression that his executive order claims were not based upon violations of the executive order's obligations, but simply included a "reference" to the executive order, upon which supplemental state claims and remedies might be formulated. (Resp. Br. at 4) In the course of doing so, he takes issue with Varian's characterization of his claims as claims based upon, and existing solely by virtue of, Varian's alleged violation of its obligations under Executive Order 11246 and its implementing regulations. Respondent's argument, however, is contrary to the allegations of his complaint, the briefs he filed below, the decision of the district court, and the findings and assumptions of the Ninth Circuit.

The First Amended Complaint, in which the subject claims were raised, directly contradicts Respondent's inference. In the first cause of action, Respondent alleged that Varian, "in failing and refusing to rehire or find alternative employment for the plaintiff . . . violated . . . the requirements and obligations imposed upon the said defendant as a government contractor with the United States of America under affirmative action programs established by Executive Order No. 11246 and its implementing regulations, 41 CFR §§ 60-1.1 et seq., and, *as such,* violated California Government Code § 12940." (emphasis added) In his unlawful business practice claim, Respondent expressly incorporated this allegation and further alleged that "said conduct of

defendants, and each of them, amounted to an unlawful, unfair, or fraudulent business practice within the purview of Business and Professions Code § 17200." In his misrepresentation claim, Respondent alleged that Varian had represented that it "had and would continue to carry out an affirmative action program that complied with the requirements of Executive Order 11246 and its implementing regulations," but that "defendants and each of them had not complied fully with their obligations for an affirmative action program, and . . . did not intend to comply fully with the requirements for such a program," thereby subjecting them to liability.

Thus, Respondent expressly based his claims upon Varian's alleged violation of its federal obligations, without reference to independent state requirements, and was using the state statutes solely to supplement his federal remedies for these violations. As this Court held in *Franchise Tax Board v. Laborers' Vacation Trust,* 463 U.S. 1, 10 (1983), whether a case arises under federal law "must be determined from what necessarily appears in the plaintiff's statement of his own claim. . . ."

The nature of plaintiff's claims also was clearly expressed by Respondent's attorney in the briefs he filed in support of his motion for leave to file the First Amended Complaint, his brief before the district court, and his brief before the Ninth Circuit. In a declaration filed in support of a motion to continue Petitioner's summary judgment motion in the state court, Mr. Yanowitz explained that he desired to file an amended pleading "to present the theory that the defendant had failed to meet its obligations to minorities under the regulations governing contractors with the federal government and [to] assert that this failure created a state cause of action." He repeated this allegation in his declaration and brief in opposition to Petitioner's summary judgment motion. In his brief in support of Respondent's motion for leave to file the First Amended Complaint, he defended the viability of the executive order claim by stating, "The violation of the requirements of Executive Order No. 11246 and 41 C.F.R. §§ 60-1.1 et seq. should form the basis of liability under Government Code § 12940. . . ."

In the "Statement of the Case" portion of his opening brief in the district court, Respondent explained his executive order claims as follows:

> "The plaintiff, a black, alleges that defendant violated California Government Code § 12940, the California Fair Employment and Housing Act, in that the conduct of the defendant in placing him on lay-off status and in failing and refusing to rehire or find alternative employment . . . violated . . . the affirmative action obligations imposed upon the defendant as a federal government contractor under Executive Order No. 11246 and its implementing regulations."

Plaintiff's complaint, and his brief and argument before the district court, led the district court to conclude, in a finding not contested by the Ninth Circuit, that resolving the executive order causes of action "will require the court to determine whether federal law created a duty, and if it did, the nature of that federal duty and whether defendant's conduct constituted a breach of that duty. The case is, therefore, a clear example of a 'substantial dispute over the effect of federal law' where 'the result turns on the federal question.' . . ." (Appendix B, at A-18)

The Ninth Circuit itself specifically stated that "Utley's state claims are based on Varian's alleged violation of federal law." (Appendix A, at A-4) It also noted without disagreement Varian's contention that a determination of liability on these claims would require resolution of the issue of Varian's compliance with its federal affirmative action obligations, but rejected Varian's contention that this necessary resolution of a substantial federal question mandated a conclusion that the claims arose under federal law. *Id.* at A-4.

Thus, Respondent's present effort to leave with this Court the impression that his executive order claims simply referred to Varian's status as a federal contractor, without reference to or reliance upon the requirements of the executive order and its implementing regulations, is directly contrary not only to the specific allegations of his complaint, but also to his attorney's arguments in support of the claims at each stage of the litigation. It also conflicts with the district court's and the Ninth Circuit's

characterization of the claims. As the district court held, and the Ninth Circuit did not dispute, Respondent's claims were premised solely upon Varian's federal affirmative action obligations and its alleged failure to comply with those obligations. No independent obligations under state law ever have been cited or relied upon by Respondent, and the role of state law in his executive order claims was simply to adopt the federal requirements and to provide supplemental remedies. Respondent's claims necessarily would rise or fall based upon the question of whether Varian complied with its federal obligations.

In any event, how Respondent now casts his claims is largely beside the point for purposes of the present petition. The Ninth Circuit held that Respondent's state claims were based upon Varian's alleged violation of federal law. It also assumed for purposes of its ruling that the claims necessarily would require resolution of the issue of Petitioner's compliance with its federal obligations. It is the Ninth Circuit's subsequent ruling that these assumed facts are irrelevant for federal question jurisdiction purposes that Petitioner asks this Court to consider. In so ruling, the Ninth Circuit significantly restricted the federal question jurisdiction of the federal courts, essentially ignored this Court's rulings in *Franchise Tax Board v. Laborers' Vacation Trust*, 463 U.S. 1 (1983) and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and dramatically expanded this Court's ruling in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, ___ U.S. ___, 106 S.Ct. 3229 (1986). In this respect, the Ninth Circuit's decision, and the significance of its implications for federal practice generally, justify this Court's issue of a writ of certiorari in the matter. On these points, Respondent's brief is largely silent.

II

THE NINTH CIRCUIT'S DECISION WILL IMPAIR SIGNIFICANT FEDERAL INTERESTS IN THE INTEGRITY OF THE EXECUTIVE ORDER'S ADMINISTRATIVE REMEDIAL SCHEME

Respondent also argues that ensuring the integrity and uniformity of application of an administrative remedial scheme was

"expressly rejected" in *Merrell Dow* as a basis for determining whether federal jurisdiction should be recognized over a state law claim based upon the violation of a federal statute. (Resp. Br. at 7) He further states that the federal Food Drug and Cosmetic Act (FDCA) (the statute involved in *Merrell Dow*) also had an administrative enforcement scheme, arguing that, if the existence of that enforcement scheme was not sufficient to confer "arising under" jurisdiction, the enforcement scheme under Executive Order 11246 "similarly should not create jurisdiction in this case." (Resp. Br. at 6)

Both arguments are erroneous, and both ignore the fact that the administrative enforcement scheme established by Executive Order 11246 includes a remedial scheme by which individuals can be compensated for damages incurred because of an employer's violation of its affirmative action obligations. This fact alone constitutes a significant difference between the administrative scheme considered in *Merrell Dow* and the executive order involved in this case.

Contrary to Respondent's argument, the majority opinion in *Merrell Dow* did not reject uniformity of interpretation and application of federal law as a basis for the assumption of federal question jurisdiction. The Court only held that the federal interest in uniformity, standing alone, was not sufficiently significant to warrant federal jurisdiction over a claim in which the federal standard is merely "an element of" an independent state law standard and thus is not dispositive on the question of liability. The Court explained that any misinterpretation or misapplication in such a setting significant enough to impair the marginal federal interest could be corrected by the Supreme Court.

A very different situation is presented, however, when the federal statute or regulation establishes a specific regulatory scheme and enforcement mechanism and provides individuals with specific remedies for violations of the statutory or regulatory requirements. In the latter case, the federal interest in a uniform interpretation of obligations, and in the integrity of the federal remedial scheme, provide a far greater federal interest and establish a much greater risk of impairment if independent state proceedings and remedies based upon violation of the statute or

regulation are allowed. It was the *absence* of such individual federal remedies that this Court cited in *Merrell Dow* and *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205, 215 (1934), when it ruled that inclusion of a federal statutory standard as an element of a state negligence claim is not sufficient to create federal question jurisdiction.

Respondent's argument that the administrative enforcement scheme established by the FDCA is comparable to the enforcement scheme under Executive Order 11246 (Resp. Br. at 6) is incorrect. In enacting the FDCA, Congress purposefully eliminated a proposed provision establishing individual federal remedies in deference to already existing state remedies.[1] The Act therefore does not provide *any* private or public remedies on behalf of individuals for harm suffered due to a manufacturer's violation of the statutory requirements. Under Executive Order 11246 and its implementing regulations, however, private remedies *are* available. Individuals are entitled to file administrative claims for relief, and the Department of Labor itself is able to obtain relief on behalf of individual employees for an employer's violation of its obligations. In other words, the "private federal remedy" that this Court noted *Merrell Dow* was lacking under the FDCA in fact exists under Executive Order 11246. The Ninth Circuit itself noted that this federal remedial scheme would be significantly impaired if private judicial actions, and supplemental judicial remedies, were recognized. (Appendix A, at A-10)

Thus, the private remedial scheme established by Executive Order 11246 and its implementing regulations constitutes a significant difference between the present case and the situation that existed in *Merrell Dow*. The Ninth Circuit's decision, although noting the difference, essentially rules that federal remedial schemes in federal courts are of greater significance, and are deserving of greater protection, than federal remedial schemes before administrative agencies. No explanation for this distinction between federal interests and federal choices of remedial schemes is given beyond an unexplained citation to *Merrell Dow*. As

---

[1] See discussion and authorities at footnote 2 of the Respondent's brief in *Merrell Dow*.

pointed out in Petitioner's opening brief, however, *Merrell Dow* does not support any such distinction, and in fact appears to reject it, focusing instead on the absence of a "federal remedy", not the "private right of action in federal court" standard adopted by the Ninth Circuit. 106 S.Ct. at 3235-36.[2]

Furthermore, if each state were able through its legislature or courts to impose its own version of a federal contractor's affirmative action obligations, or to provide its own set of remedies for the contractor's violation of its contractual obligations as so defined, no federal contractor would be able to know from one state to the next precisely what its obligations as a federal contractor were. The obligations imposed by virtue of federal contractor status could vary from one state to the next, and the obligations imposed by one state could conflict with the obligations imposed by another, or even with the obligations imposed by the regulations of the Department of Labor. The potential liabilities of a contractor also would far exceed those imposed by the Executive Order itself. The federal interest in conciliation and voluntary compliance easily could be impaired or subverted by individual states' preferences for litigation and a broader range of remedies.

All of these considerations led the district court and the Ninth Circuit, and all other courts that have considered the question, to conclude that private judicial remedies to enforce Executive Order 11246 would conflict with federal interests and impair the integrity of the executive order's remedial scheme. By then deciding that this ruling "perforce" precluded the exercise of federal jurisdiction under 28 U.S.C. § 1331, the Ninth Circuit in essence sanctioned the very impairment of federal interests that it held would result if judicial claims were allowed to proceed.

In conclusion, the Ninth Circuit's decision that individual remedies provided by a federal statute must exist *in federal court* as opposed to other federal forums before federal question jurisdiction attaches under § 1331 is not supported by *Merrell Dow* or

---

[2] Indeed, because administrative remedies often are more limited than judicial remedies, it would appear that such remedial schemes should receive *greater* protection, not less.

any other decision of this Court. It directly conflicts with this Court's decisions in *Franchise Tax Board* and *Smith*. If allowed to stand, it would significantly restrict the "arising under" jurisdiction of the federal courts and could impair significant federal interests under Executive Order 11246 and its implementing regulations. These significant federal interests justify this Court's consideration of the issue at this time.

III

THE JURISDICTIONAL RULINGS OF THE NINTH CIRCUIT CONFLICT WITH THE FIFTH CIRCUIT'S DECISION IN FARKAS

Respondent finally argues that there is no conflict between the Ninth Circuit's decision below and the decision of the Fifth Circuit in *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert denied*, 389 U.S. 977 (1967), stating that *Farkas* involved an original proceeding in the district court, whereas the present case involves an action removed from state court. (Resp. Br. at 6-7) According to Respondent, a different test applies to each circumstance. Respondent is mistaken.

Section 1441(a) states that any action over which the district courts have original jurisdiction may be removed to the district court. 28 U.S.C. § 1441(a) Accordingly, as this Court noted in *Franchise Tax Board* and *Merrell Dow*, "the propriety of the removal . . . turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts." *Franchise Tax Board*, 463 U.S. at 8; *Merrell Dow*, 106 S.Ct. at 3232. Thus, the test for federal jurisdiction is the same in both circumstances.

In *Farkas*, the Fifth Circuit held that federal question jurisdiction exists under § 1331 over a claim based upon an alleged violation of Executive Order 11246 even though the executive order does not permit a private judicial action to enforce its requirements. In its decision below, the Ninth Circuit held that § 1331 does *not* provide federal question jurisdiction over a claim based upon violation of Executive Order 11246 because the executive order does not create a private judicial action to enforce its requirements. Interpretation of the removal statute did not

even enter its discussion. The two decisions both involve an interpretation of federal question jurisdiction under § 1331, and they are in direct and irreconcilable conflict. As previously pointed out, the Ninth Circuit's approach also conflicts with this Court's decision in *Bell v. Hood,* 327 U.S. 678, 682 (1946), which involved a different regulatory scheme.

The "policy considerations" upon which Respondent relies to support his differentiation between an executive order claim originally filed in the district court and one originally filed in state court (Resp. Br. at 7) are not explained, and indeed are not even identified. Nothing in *Merrell Dow* supports a different interpretation of § 1331 in a removal context than in an original jurisdiction context. Under 28 U.S.C. § 1441(a), if the federal courts have jurisdiction under § 1331 in the context of an original proceeding, they also have jurisdiction over the claim in a removal context. Plaintiff cites no authority to the contrary.

The clear conflict between the Fifth Circuit and the Ninth Circuit, not only with respect to their specific rulings concerning jurisdiction over claims based upon alleged violations of Executive Order 11246, but also in their general approach to federal question jurisdiction in the absence of a private judicial action to enforce a federal statute's requirements, involve matters of significant federal interest, not only to the Executive Branch in connection with Executive Order 11246, but also to the federal judiciary and the federal bar in connection with the jurisdiction of the federal courts under § 1331. The federal interests at issue in both areas amply warrant this Court's issuance of a writ of certiorari.

IV

CONCLUSION

The issues raised by the Ninth Circuit's decision and in the petition for a writ of certiorari present significant questions of federal law and policy and have a direct and substantial impact on practice in the federal courts. The Ninth Circuit's decision significantly restricts the federal question jurisdiction of the federal courts, impairs substantial federal interests in the integrity of the administrative and remedial scheme under Executive Order 11246, and conflicts with the approach and rulings of the Fifth Circuit on the issues involved. The questions raised in the petition clearly are worthy of this Court's consideration. Varian's petition for a writ of certiorari therefore should be granted on each of the issues presented.

Dated: August 6, 1987.

Respectfully submitted,

GILMORE F. DIEKMANN, JR.
BRONSON, BRONSON & MCKINNON

By _____
Attorneys for Petitioner
Varian Associates, Inc.